SUPREME COURT, U. S.

No. 73-443

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1973

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 477 F. 2d 260. The Board's decision and order (Pet. App. 36a-37a, 16a-35a) are reported at 197 NLRB No. 59.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1973 (Pet. App. 14a-15a), and a petition for rehearing was denied on June 13, 1973 (Pet. 1). The petition for a writ of certiorari was filed on September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union induced and encouraged its members employed by neutral employers to refuse to handle and install materials from a struck employer, and restrained and coerced neutral employers, in order to force them to cease doing business with the struck employer, in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B).

2. Whether the Board's cease and desist order was overly broad.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.* are set forth at Pet. App. 38a-39a.

STATEMENT

Petitioner Local 3 (the Union) represents employees of L. K. Comstock & Co., the Lord Electric Company, and J. Livingston & Co., three contractors of the New York Telephone Company ("Telco") (Pet. App. 18a; A. 63, 69).[1] These contractors install telephone wire, cable, and other materials in buildings, under construction or undergoing major alterations, in New York City (Pet. App. 18a; A. 60-61). Ordinarily, Telco employees deliver the necessary material to the jobsite and unload it; then, the employees of the contractor move the equipment to its installation point (Pet. App. 18a-19a; A. 61).

Employees of Telco who are represented by another union went on strike on July 14, 1971[2] (Pet. App. 19a;

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[1] "A." references are to the appendix in the court of appeals.

[2] All dates hereafter are in 1971.

A. 61-62). Thereafter Telco management personnel began making deliveries of installation materials (Pet. App. 19a; A. 61). These deliveries were accepted, with minor exceptions, until August 31 (Pet. App. 19a; A. 62). On that date, at a luncheon meeting called to discuss the effect of the strike on work of the contractors, Thomas Van Arsdale, business manager of the Union, informed a Telco supervisor, Peter J. McCall, that deliveries of supplies by Telco supervisors would likely be refused by employees of the contractors (Pet. App. 20a-21a; A. 62-63, 128-130). After the meeting, Telco had the deliveries of supplies made by independent truckers, and they were accepted (Pet. App. 22a; A. 63-64).

On September 9, the Union held its regular monthly membership meeting, at which the Telco strike was discussed (Pet. App. 22a; A. 140). Business Manager Van Arsdale later testified that he told the members "that if there were management people delivering material to jobs which normally would have been delivered by men who are on strike, * * * [or] if an outside trucking company were employed to make a delivery that normally would have been made by men who were on strike, that under those circumstances those men would be acting as strike breakers" (Pet. App. 22a-23a; A. 140). He added that, "if we were * * * to be true to the trade union principles, * * * there * * * would be no basis for men working under these circumstances" (Pet. App. 23a; A. 141). Finally, Van Arsdale stated that each individual member would have to decide for himself what position to take and that the Union had "no instructions *per se* regarding the matter" (Pet. App. 23a, 28a; A. 144-145).

On September 9, employees of the Comstock Company at one site, and employees of the Lord Company at another site, refused to install telephone wire and cable

because it had been delivered by substitutes for the striking Telco employees (Pet. App. 25a; A. 66-68). On September 10, a foreman for the Livingston Company, and a member of the Union, refused to install cable delivered by management personnel (Pet. App. 25a; A. 70-71). Later that day, the same foreman appeared at another site and refused delivery of Telco materials (Pet. App. 26a; A. 73). On September 17, there was another refusal to work by the members of the Union at a new site (Pet. App. 26a; A. 73).

The Union's constitution and bylaws prohibit individual strike action and prescribe disciplinary proceedings for members who violate the constitution or bylaws (Pet. App. 25a; A. 33-37). No action was taken against any employee refusing to install Telco equipment (Pet. App. 25a).

On September 21, Telco filed unfair labor practice charges against the Union with the National Labor Relations Board (Pet. App. 17a). The Board's Regional Director obtained from the district court a restraining order prohibiting further unlawful work stoppages, pending a final Board determination (Pet. App. 25a; 80 LRRM 2436 (S.D.N.Y.)). Thereafter, employees of the Comstock Company refused to install materials at two sites; the district court found the Union responsible for these refusals and held the Union in civil contempt of the restraining order (Pet. App. 26a; A. 107-115; 337 F. Supp. 31 (S.D.N.Y.)).

The Board, adopting its Trial Examiner's decision, found that, through Van Arsdale's September 9 speech, "Local 3 induced and encouraged employees of Telco's contractors to refuse to handle or install materials delivered to jobsites of the contractors * * *" in violation of Section 8(b)(4)(i)(B) of the Act, and that "[t]he

inducement and encouragement having resulted in an interruption of business between Telco and its contractors, the conduct of Local 3 also operated as a restraint upon secondary and neutral employees" (Pet. App. 30a). The Board entered an appropriate remedial order (Pet. App. 33a-35a). The court of appeals enforced the Board's order in full (Pet. App. 1a-15a).

ARGUMENT

1. Contrary to the Union's first contention (Pet. 5-8), Van Arsdale's statements to the Union membership on September 9, 1971, were not protected by the First Amendment. The Board found, and the court below agreed (Pet. App. 6a-7a), that Van Arsdale's statements constituted more than a mere expression of opinion; rather, they "must be interpreted as inducement and encouragement of [the members] by Local 3 to decline to handle or install the material in controversy" (Pet. App. 28a). As this Court ruled in *Electrical Workers* v. *National Labor Relations Board,* 341 U.S. 694, 705, "The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) [now Section 8 (b)(4)(B)], carries no unconstitutional abridgement of free speech."

2. The Union also contends (Pet. 9-10) that, since the purpose of Section 8(b)(4)(B) is to protect employers in the position of neutrals between contending parties, the Union cannot be found in violation of that section on the basis of charges filed solely by the primary employer, Telco. But the Act places no restrictions on who may file a charge (Section 10(b), 29 U.S.C. 160(b)), and "the person or group making the charges does not become the actor in the proceeding." *Amalgamated Workers* v. *Consolidated Edison Co.,* 309 U.S. 261, 265. Instead, "[t]he Board as a public agency

acting in the public interest" assumes sole responsibility for vindicating the policies of the Act (*ibid.*). Since Congress declared secondary activity violative of Section 8(b)(4)(B) to be contrary to public policy, the Board properly proscribed such activity, even though the neutral employers who were the immediate victims of the activity failed to complain.[3]

3. The Union further argues (Pet. 10-12) that its actions were protected by the proviso to Section 8(b) which permits a "refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike * * *." However, as the court below stated: "[F]or the proviso to be applicable here, the Local 3 members must be considered as *refusing to enter Telco premises* when they engaged in the work stoppages. Such a characterization of the Union actions is absurd. It stretches credulity to call the construction projects here Telco premises; indeed, a rational analysis would seem to show that the construction sites were precisely the premises 'of his own employer' that are without the proviso" (Pet. App. 12a).

4. Finally, contrary to the Union's contention (Pet. 12-13), the Board's order is not overly broad. Insofar as that order requires the Union to refrain from engaging in unlawful secondary activity not merely against the three subcontractors immediately involved, but also against "any other person engaged in commerce", its propriety is established by *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705-706, where the Court approved a similar type of order.

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[3] As the court below noted (Pet. App. 10a), "[I]t is the neutral employer, subjected to secondary pressure by the offending union, who may most often be unwilling to go to the NLRB."

Insofar as the order protects primary employers other than Telco,[4] it is justified by the Union's long history (Pet. App. 31a) of engaging in secondary activity violative of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The order prohibits secondary activity where an object is to force "Comstock, Lord, Livingston, or any other employer or person to cease doing business with New York Telephone Company, or with any other employer or person" (Pet. App. 33a).

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